STATE OF MICHIGAN

COURT OF APPEALS

KEVIN SCOTT,

Plaintiff-Appellant,

v

JAMES CHRISTENSEN and ROBERT BERNHOFT,

Defendants-Appellees.

UNPUBLISHED
April 8, 2014

No. 312349
Wayne Circuit Court
LC No. 10-012561 CK

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

In this action for breach of contract and fraud, plaintiff appeals as of right the trial court's order granting summary disposition to defendants. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Sometime late in 2004, Phil Henry and Robert Keasey, who together owned a "Muffler Man" dealership in Inkster, approached defendant Robert Bernhoft and advised him that they wanted to sell their dealership to plaintiff and his partner, Aaron Lawrence.[1] Bernhoft was the president of Muffler Man Supply Company (MMS), a distributor of automotive parts whose corporate stock was owned by defendant James Christensen. Henry and Keasey owned the business that comprised their dealership, including its equipment and inventory, and maintained a Dealer Agreement with MMS, as discussed *infra*, that in part permitted the business to use the "Muffler Man" trademark and logo. However, they did not own the building in which the business was located; rather, Christensen owned the building, and Henry and Keasey had a lease agreement with Christensen.

Typically, according to Bernhoft, once a buyer purchased the assets, equipment, and other accoutrements of a "Muffler Man" dealership, MMS would enter into a Dealer Agreement with the buyer. Bernhoft stated in his deposition that the Dealer Agreement had nothing to do with any of the assets or property that might be included in the business. The Dealer Agreement

[1] Aaron Lawrence is not a party to this lawsuit.

instead authorizes a dealer to operate his business using the "Muffler Man" trademark and logo. The Dealer Agreement also contains a provision requiring the operator of a "Muffler Man" dealership to pay a monthly fee to cover the placement of Yellow Pages advertisements. Although a dealer could sell his business, the Dealer Agreement is non-transferable. According to Bernhoft, the Dealer Agreement with MMS was entirely separate from the lease agreement with Christensen. The Dealer Agreement provided, in part:

> 13. Dealer is Not Agent of Company: Dealer understands and agrees that Dealer is neither an employee or [sic] an agent of Company. Company and Dealer are each independent contractors, they are not and shall not be considered as joint venturers, partners, or agents of each other. Neither shall have the authority to bind or obligate the other except as expressly set forth in this Agreement. Neither shall have the authority to hire, fire, or direct any employees of the other, except as set forth in this Agreement. Neither is responsible for the collection, withholding or payment of any tax obligations of the others.
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> * * *
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> Dealer shall conspicuously display a sign on its premises and conspicuously indicate on any and all of its printed materials, that Dealer is an independent owner and operator.

When Henry and Keasey approached Bernhoft about selling their dealership, he told them that, although they could sell their business, they had to get permission from Christensen to lease the building to plaintiff and his partner. Christensen stated that he wanted Henry and Keasey to keep their names on the lease, but agreed to let them sublease the building to plaintiff. A document entitled "Addendum to Lease" was drawn up, and Christensen authorized Bernhoft, as he often did, to use his signature stamp to sign the Addendum. The Addendum to Lease referenced a lease signed on December 1, 1991 between Christensen (Lessor) and Henry and Keasey (Lessees). It provided, in pertinent part:

> Lessor agrees to allow Lessees to sublet the premises . . . to Kevin Scott and Aaron Lawrence, hereinafter referred to as Sublessees. This sublease shall run concurrently with the lease. At the end of the term of the sublease, if Sublessees satisfactorily complete the terms of their agreement with Lessees, Lessor does hereby agree to assign a lease of the premises to Sublessees at the end of the Sublease term.
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> In the event that Lessees fall behind in their rent payments by more than thirty days, Lessor does hereby agree to notify Sublessees by certified mail within seven days of this failure to pay.
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> These lease and subleases will run concurrently and contemporaneously with a certain Dealer Agreement of an even date with the lease.

Plaintiff's attorney drafted an Asset Purchase Agreement regarding the sale of Henry and Keasey's business to plaintiff and Lawrence. The Addendum to Lease was attached to that agreement. The Asset Purchase Agreement, which was between plaintiff and Lawrence (buyer)

and Henry and Keasey (seller), was executed and signed by its four named parties and provided that, in exchange for all the named assets of the business, its goodwill, and a covenant not to compete, Lawrence and plaintiff would remit $200,000 to Henry and Keasey. Plaintiff agreed in his deposition that nowhere in the Asset Purchase Agreement did it mention the words "building" or "real estate." However, plaintiff stated that he believed that he was purchasing the building from Henry and Keasey, and plaintiff alleged that they told him they owned the building. Plaintiff gave Henry and Keasey $100,000 at the closing and signed a promissory note for $100,000. Defendants were not parties to the Asset Purchase Agreement, did not sign it, and were not present at the closing.

Although Christensen was not a party to the sublease reflected in the Addendum to Lease, plaintiff made rent payments by check directly to Christensen. Plaintiff was also required (as the Dealer Agreement provided) to make monthly payments to MMS for the Yellow Pages ads. At times he combined the two payments and sent Christensen a check for both rent and the Yellow Pages ads.

All parties agreed that plaintiff must have had a Dealer Agreement because he did business under the "Muffler Man" logo and bought supplies from MMS.[2] Bernhoft also testified that plaintiff must have had a Dealer Agreement because the requirement to pay for the Yellow Pages ads was contained in the Dealer Agreement. Because plaintiff was being billed for the Yellow Pages ads, Bernhoft assumed that he had a Dealer Agreement.

Other than agreeing to permit plaintiff to sublease under the terms of the lease with Henry and Keasey, Christensen stated that he was not involved in any of the discussions between plaintiff and Henry and Keasey, nor was he responsible for anything that was said during negotiations between plaintiff and Henry and Keasey. Christensen stated that his only responsibility was to make sure that plaintiff had a lease and a proper Dealer Agreement so that plaintiff could understand all the rules, including the Yellow Pages agreement that was part of the Dealer Agreement.

Almost immediately, plaintiff fell behind on his payments. Plaintiff was sued by Henry and Keasey for nonpayment of his promissory note and for rent. At that point, he stopped

[2] Both the Dealer Agreement and an Addendum to Dealer Agreement indicated that Christensen was to sign in his representative capacity as "President" of MMS. Bernhoft averred by affidavit that he was president of MMS in 2004, while Christensen averred that he was the owner of MMS in 2004. However, the Dealer Agreement provides signature blanks for "James M Christensen, president." The parties appear to agree that Bernhoft was president of MMS and Christensen was the owner at the relevant times; it is thus unclear whether the signature blanks indicate the intent to have Bernhoft or Christensen sign the document. Although Lawrence and plaintiff signed both the agreement and the addendum, neither Christensen nor Bernhoft signed either document. However, defendants never questioned whether plaintiff and Lawrence had a Dealer Agreement because, as Bernhoft stated, it was "assumed" that he did have a Dealer Agreement because he would not have been allowed to operate as "Muffler Man" without one.

making rent payments to Christensen. Christensen filed a lawsuit against Henry and Keasey, and against plaintiff, for nonpayment of rent. Plaintiff was eventually evicted from the building.

Plaintiff filed a complaint naming as defendants only Christensen as "Owner" of MMS and Bernhoft as its "President," alleging breach of contract, fraud, and a violation of restrictive covenants. Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that there was no contract between plaintiff and defendants, that no restrictive covenants existed between plaintiff and defendants, and that no fraud was committed by defendant Christensen.[3] The circuit court granted the motion under MCR 2.116(C)(10), holding:

> First, there is no evidence of any contracts, written or oral, between Plaintiff and Defendants. This Court is satisfied that the written contracts relied upon by Plaintiff are between him and Mr. Keasey and Mr. Henry, not these Defendants. Defendant Christensen, through Defendant Bernhoft, simply gave permission to sublease through the October 24, 2004 Addendum. While Plaintiff argues that Defendant Christensen must have given a power of attorney to Mr. Keasey and Mr. Henry, this Court is satisfied that a power of attorney was not required and all that was mandated was written permission to sublet the property Further, the Addendum makes clear that it is a sublease and not an assignment of the lease. This is further supported by the language in the Asset Purchase Agreement stating: "[s]eller leases the buildings and real estate from James [Christensen] and has secured all required permission to sublease same to Buyers and has full power and authority to enter into this Agreement and convey title and possession/use of the Property as contemplated by this Agreement." Also, in his May 17, 2007 deposition, Defendant Bernhoft even testified that Plaintiff and his partner wanted a direct lease with Defendant Christensen but that Defendant Christensen did not want that; he was only willing to allow a sublease because he did not want a direct relationship with Plaintiff and his partner until they proved themselves.
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> Moreover, the plain language of the Purchase Agreement excludes third-parties to the contract by stating that it "shall not confer any rights or remedies upon any party other than Buyer and Seller and their respective successors and permitted assigns." In addition, Defendants are not referenced in the Bill of Sale, the Promissory Note, or the Covenant Not to Compete. While Plaintiff argues that Defendant Christensen is bound by a Dealer Agreement and/or December 16, 2004 Addendum to Dealer Agreement, this Court is satisfied that Defendant Christensen never signed or otherwise agreed to be bound by said agreements.

[3] Although the body of defendants' summary disposition motion does not specifically address a claim of fraud against Bernhoft, Bernhoft signed an affidavit wherein he averred that he never granted Henry and Keasey any authority to represent MMS in dealing with plaintiff. Plaintiff's fraud complaints against both defendants were identical and based on the idea that Henry and Keasey made misrepresentations while acting on authority given them by defendants.

> There are also no oral contracts here because there is nothing to show a meeting of the minds or that promises were made. Summary disposition is proper on Plaintiff's Breach of Contract claim in favor of Defendants.
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> Second, with regard to Plaintiff's claim for Violation of Restrictive Covenants, this Court is satisfied that because there were no Covenants Not to Compete that were binding on Defendants since they were not parties to said agreements, summary disposition is proper on this claim as well in favor of Defendants. As already noted, neither Defendant signed the Covenants and Mr. Keasey and Mr. Henry were not acting as their agents.
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> Lastly, summary disposition is proper on the fraud claim in favor of Defendants. It is well-established that fraud must be shown by clear, satisfactory, and convincing evidence This Court is satisfied that there is no clear and convincing evidence of any fraudulent misrepresentations, intent to defraud, or justifiable reliance. Further, there is no evidence that Defendants had a duty to disclose anything to Plaintiff in order to support a claim for silent fraud. Plaintiff has not met his standard of establishing fraud and summary disposition is therefore proper

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant or denial of summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under MCL 2.116(C)(10), a reviewing court considers affidavits, pleadings, deposition, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. PLAINTIFF DID NOT ESTABLISH THE EXISTENCE OF A CONTRACT BETWEEN PLAINTIFF AND DEFENDANTS

Plaintiff first argues that the trial court erred when it found that there was no evidence of any contracts, written or oral, between plaintiff and defendants. We disagree.

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract, and (3) that the part asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012), lv gtd on other grounds 494 Mich 861; 831 NW2d 234 (2013). See also *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990).

Plaintiff has not established that a written contract between himself and the defendants existed. None of the documents on record contain the signature of defendant Bernhoft. The only

document signed by defendant Christensen was the Addendum to Lease. The Addendum to Lease referenced the lease between Henry and Keasey (Lessees) and Christensen (Lessor) concerning the building in which the Lessees operated their "Muffler Man" business. In the Addendum to Lease, Christensen agreed to allow the Lessees to sublease that building to plaintiff and his partner (the Sublessees). The Addendum provided that, at the end of the term of the sublease, if the "Sublessees [had] satisfactorily complete[ed] the terms of their agreement with Lessees," Christensen would agree to assign a lease of the premises to Sublessees. The only other obligation relating to the Sublessees included in the Addendum to Lease was that Christensen agreed to notify them by certified mail within seven days if the Lessees fell behind in their rent payments by more than 30 days. There is no evidence that Christensen ever breached this obligation.

In addition, the Dealer Agreement clearly provides that the agreement was between MMS and plaintiff and his partner. It appears to have been intended that either Christensen or Bernhoft would sign in his capacity as "President" of MMS.[4] However, there is no Dealer Agreement in the record that was signed by Christensen, and even if he had signed it, it would have been on behalf of MMS, which was the party to the contract. All other contracts relied on by plaintiff were clearly between the sellers, Henry and Keasey, and plaintiff and his partner. Thus, upon our review of the record, the trial court did not err in finding no evidence of any written contracts between plaintiff and defendants.

Additionally, plaintiff did not establish the existence of an oral contract between himself and defendants. In his deposition, plaintiff agreed that he did not have an oral contract with Christensen, because he had never spoken directly to him, but alleged that he did have an oral contract with Bernhoft. We disagree. Plaintiff's reliance on *Pakideh v Franklin Commercial Mortg Group, Inc*, 213 Mich App 636; 540 NW2d 777 (1995), is misplaced. The issue in *Pakideh* concerned whether the defendant's offer was properly accepted by the plaintiff according to the terms of the written offer. Because the plaintiff did not accept the defendant's offer in compliance with the terms of the offer, the *Pakideh* court found that no contract existed between the parties as a matter of law. *Id*. at 637-642. In this case, by contrast, plaintiff has failed to describe any "offer" made by Bernhoft. He has merely described a conversation they had when plaintiff visited the MMS facility. We find that *Pakideh* does not support, either factually and legally, plaintiff's position that he had an oral contract with Bernhoft. Plaintiff's testimony clearly describes "mere discussions and negotiation" at best, and "cannot be a substitute for the formal requirements of a contract." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). Accordingly, the trial court did not err in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's breach of contract claim based on the court's finding that plaintiff had no written or oral contract with defendants.

[4] See footnote 2, *supra*.

IV. PLAINTIFF DID NOT ESTABLISH FRAUD

Next, plaintiff contends that the trial court erred when it found that he could not meet the standard to establish fraud. We disagree. To state a valid claim for fraud, a plaintiff must establish the following elements:

> That defendant made a material representation; (2) that is was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012).]

Allegations of fraud and the circumstances constituting fraud must be pleaded with particularity. MCR 2.112(B)(1). General allegations or mere speculation are insufficient. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Fraud must be clearly proved by clear, satisfactory and convincing evidence. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008).

In his deposition, plaintiff stated that the "fraud" was that Bernhoft had told him he was buying a "Muffler Man" franchise. However, plaintiff can produce no writing that reflects that Bernhoft made that statement, and Bernhoft disputes it. The record shows that plaintiff and his partner purchased the business from Henry and Keasey pursuant to an asset purchase agreement, which describes exactly what was purchased, and the Dealer Agreement between plaintiff and MMS clearly explained all aspects of what it meant to be a "Muffler Man" dealer. In addition, plaintiff made no showing that he suffered in any way because he purchased a business that comprised a "Muffler Man" dealership instead of a "franchise." Plaintiff brought his own attorney into the negotiations to oversee all of the contracts. Plaintiff has not demonstrated that either defendant made a material misrepresentation concerning what he was purchasing.

Plaintiff next contends that defendants gave the sellers, Henry and Keasey, authority to act as defendants' agents, and that the sellers made misrepresentations on behalf of defendants. Relatedly, plaintiff appears to argue that defendants committed fraud by allowing Henry and Keasey to sell "a fictitious Muffler Man Franchise" without disclosing that the ability to use MMS logos, products, etc was governed by the (non-transferable) Dealer Agreement. However, the Dealer Agreement clearly provided in ¶ 13 that a dealer is not "an agent of [the] Company" and shall not have any authority to bind or obligate MMS other than "as expressly set forth in the Agreement." Moreover, defendants both stated that the sellers owned their business and did not need permission from them to sell it. The sellers sold their business pursuant to the Asset Purchase Agreement. MMS merely had the ability to permit or deny plaintiff to enter into a Dealer Agreement with MMS, which would allow him to use the "Muffler Man" logo and purchase "Muffler Man" supplies, as was clearly stated in the Dealer Agreement. In addition, because Christensen owned the building, the sellers needed his permission to sublease it to plaintiff. Plaintiff has failed to demonstrate what fraud was perpetrated. The Asset Purchase Agreement does not make the representation that a "Muffler Man Franchise" was being sold. Similarly, plaintiff's contention that he was fraudulently led to believe that he was purchasing the building is without merit. Plaintiff agreed in his deposition that nowhere in the asset

purchase agreement was there any mention of a building or real estate, the Addendum to Lease made it very clear that he was subleasing the building from the sellers, and plaintiff testified that he made rent payments to Christensen.

Plaintiff further contends that a fraud was committed because he was not told that Henry and Keasey still owed money to MMS when he purchased their business. The record reveals that when the Henry and Keasey sold their business to plaintiff, they still owed MMS $26,168.49 for Yellow Pages advertising. To this end, on May 20, 2004, Henry and Keasey signed a promissory note to MMS, in which they agreed to pay the amount owed, plus seven percent interest, to MMS pursuant to a payment program set up in the promissory note. Henry and Keasey agreed that the promissory note was "given in forbearance by [MMS] from instituting litigation to recover such sums." Plaintiff has not demonstrated that defendants owed him a duty to disclose this or made any material representation that was false. Further, he has not shown that he suffered any injury because of the promissory note between Henry and Keasey and MMS. *Titan Ins Co*, 491 Mich at 555.

Finally, plaintiff alleges that fraud occurred because Henry and Keasey were on a month-to-month lease with Christensen. Since the Addendum to Lease provided that the sublease "shall run concurrently with the lease" and that, "[a]t the end of the term of the sublease, if Sublessees satisfactorily complete the terms of their agreement with Lessees, Lessor does hereby agree to assign a lease of the premises to Sublessees at the end of the Sublease term," plaintiff argues that he should have been given a lease at the end of the first month. However, the sublease that plaintiff and his partner signed with the sellers clearly provided in ¶ 2 that the "term of the lease shall commence on November 1, 2004 and extend for one year with yearly options thereafter at the same rate." Plaintiff does not describe any injury that occurred to him as a result of not being able to obtain a lease after 30 days. The record clearly shows that plaintiff fell behind in his rental payments and then stopped making them altogether, until he was finally forced out of the building. Plaintiff has not demonstrated that having a lease with Christensen rather than a sublease with Henry and Keasey would have had any effect on his ability to make payments.

Upon de novo review, we find that the trial court correctly concluded that plaintiff was not able to demonstrate any fraud committed by defendants. Plaintiff's claims of fraud have not been clearly proved by clear, satisfactory and convincing evidence.[5] MCR 2.112(B)(1); *Cooper*, 481 Mich at 414.

[5] Although the trial court did not so find, we question whether plaintiff even pleaded the elements of fraud with particularity. MCR 2.112(B)(1), *LaMothe*, 214 Mich App at 586. Thus, summary disposition may well have been granted by the trial court pursuant to MCR 2.116(C)(8). See *Cummins v Robinson Twp*, 283 Mich App 677, 695; 770 NW2d 421 (2009). However, "this Court may affirm an order granting summary disposition if summary disposition would have been correctly granted under a different subrule." *Spiek v Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). We therefore affirm the trial court's grant of summary disposition to defendants under MCR 2.116(C)(10), notwithstanding that plaintiff's fraud claim may have been appropriately dismissed under MCR 2.116(C)(8).

Affirmed.[6]

/s/ Cynthia Diane Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra

[6] Plaintiff appears to have abandoned the argument that restrictive covenants not to compete existed between plaintiff and defendants. Plaintiff does not raise an issue on appeal contesting the trial court's decision on the restrictive covenant claim. He does not address restrictive covenants other than in a footnote on p 5 of his appellate brief, and even there does not address whether or how the trial court's ruling in that regard was in error, nor provide any legal argument or citation to authority concerning this claim. See *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). In any event, the record does not support the conclusion that any restrictive covenants existed between plaintiff and defendants, for the same reasons that support our conclusion that no written or oral contract existed between the parties.